No. SC92450

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

JEFFREY D. ANDERSON,

Respondent.

Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Calvin R. Holden, Judge

APPELLANT'S BRIEF

CHRIS KOSTER
Attorney General

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3700
Fax: (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

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ISSUE PRESENTED

Article I, § 17 of the Missouri Constitution provides that no one may be prosecuted for a felony "otherwise than by indictment of information," but it also states that this shall not "prevent arrests and preliminary examination in any criminal case." Subsection 5 of § 556.036 (criminal statute of limitations) provides that a "prosecution is commenced" for a felony "when the complaint or indictment is filed." Under Missouri's criminal procedure rules, a complaint must eventually be followed with the filing of an information to continue the prosecution. Does § 556.036.5, which defines the filing of a complaint as one of the triggering events tolling the statute of limitations, violate the constitution by purporting to authorize a criminal prosecution only by complaint?

JURISDICTIONAL STATEMENT

This is an appeal from a Greene County Circuit Court judgment declaring subsection 5 of § 556.036[1] (criminal statute of limitations) unconstitutional and dismissing with prejudice Appellant's (the State's) felony complaint against Respondent (Defendant). This Court has jurisdiction over this appeal by the State because it involves the circuit court's declaration that subsection 5 of the criminal statute of limitations is unconstitutional and its dismissal with prejudice of charges against Defendant based on the filing of charges beyond the statute-of-limitations deadline. *See* § 547.200.2, RSMo 2000; *State v. Brown*, 140 S.W.3d 51, 53 (Mo. banc 2004) (holding that the State had the right to appeal a circuit court judgment declaring two statutory offenses unconstitutional that resulted in "an outright dismissal"of charges); *State v. Delong*, 348 S.W.3d 866, 868 n.2 (Mo. App. S.D. 2011) (holding that the State had the right to appeal a circuit court judgment dismissing with prejudice all pending criminal charges). *See also State v. Burns*, 994 S.W.2d 941, 942 (Mo. banc 1999) (noting that "in a criminal case, a judgment is final when the trial court enters an order of

[1] All sectional references are to the 2011 cumulative supplement to the 2000 Revised Statutes of Missouri (RSMo Cum. Supp. 2011), unless otherwise indicated.

dismissal or discharge of the defendant prior to trial which has the effect of foreclosing any further prosecution of the defendant on a particular charge"). The circuit court's judgment in this case has the effect of precluding any further prosecution of Defendant for the charge alleged in the felony complaint.

Furthermore, since this case involves the validity of a state statute, this Court has exclusive appellate jurisdiction. MO. CONST. art. I, § 3.

STATEMENT OF FACTS

On February 25, 2011, the State filed a felony complaint against Defendant in Greene County Circuit Court alleging that on or about March 12, 2008, Defendant committed the class C felonies of burglary and stealing. (L.F. 1, 6-7). Attached to the felony complaint was a probable cause statement from the Springfield Police Department attesting that on March 12, 2008, Defendant and an accomplice used a rock to break a window at a local business, entered the business through the broken window, and stole a money bag containing $1,596 in cash and checks. (L.F. 8-9). The statement further stated that DNA analysis confirmed the presence of Defendant's blood on the broken window and Defendant confessed to the crime. (L.F. 8-9). An arrest warrant was issued on February 28, 2011, which was served on Defendant on March 8, 2011, and Defendant was arraigned the same day. (L.F. 1-2). After waiving his right to a preliminary hearing on May 2, 2011, Defendant was bound over for arraignment in circuit court. (L.F. 2).

On May 6, 2011, the State filed a felony information charging Defendant with one count of second-degree burglary and one count of stealing over $500. (L.F. 10-11). On December 21, 2011, Defendant filed a motion to dismiss the case with prejudice on the ground that subsection 5 of § 536.036 (criminal statute of limitations) was unconstitutional in that it provided for the commencement of a felony prosecution by the filing of a complaint or

indictment in violation of article I, § 17 of the Missouri Constitution, which provides that "no person shall be prosecuted . . . otherwise than by indictment or information." (L.F. 4, 12-13). Defendant argued that since an information or indictment was not filed against him within three years of the alleged offense, the statute of limitations barred any prosecution of him. (L.F. 13). Following the State's response to the motion and a hearing, the circuit court entered a judgment sustaining Defendant's motion and dismissing the case against Defendant with prejudice. (L.F. 4-5, 18-19). This appeal followed.

POINTS RELIED ON

I (constitutionality of statute of limitations).

The circuit court erred in declaring subsection 5 of § 556.036 (criminal statute of limitations) unconstitutional because this subsection, which provides that "[a] prosecution is commenced . . . for a felony when the complaint or indictment is filed," does not "clearly and undoubtedly" violate article I, § 17 of the Missouri Constitution, which provides "[t]hat no person shall be prosecuted criminally for felony . . . otherwise than by indictment or information," in that: (1) subsection 5 only identifies the commencement of a prosecution for statute-of-limitations purposes and does not directly contravene article I, § 17, which does not purport to define when a criminal prosecution commences, but merely requires the filing of an information or indictment to prosecute a defendant; (2) subsection 5 does not purport to permit prosecution by complaint only, but only identifies the filing of a felony complaint as the triggering event that tolls the statute of limitations; and (3) statutes of limitations are legislative creations and it is within the legislature's prerogative to determine their length and the events that trigger or toll their application.

State v. Corley, 251 S.W.3d 416 (Mo. App. S.D. 2008);

Freesmeier v. Hunt, 530 S.W.2d 1 (Mo. App. St.L.D. 1975);

State v. Graham, 149 S.W.3d 465 (Mo. App. E.D. 2004);

State v. Richard, 298 S.W.3d 529 (Mo. banc 2009);

MO. CONST. art. I, § 17;

Section 556.036, RSMo Cum. Supp. 2011.

II (dismissal of prosecution).

The circuit court erred in dismissing with prejudice the criminal case against Defendant because the three-year statute-of-limitations period contained in § 556.036 begins on the day after the offense is allegedly committed and is tolled by the filing of a complaint or indictment in that the record shows that Defendant allegedly committed the felony offenses of burglary and stealing on March 12, 2008, and the State filed a felony complaint against Defendant on February 28, 2011, which was within the three-year limitations period.

State v. Stein, 876 S.W.2d 623, 626 (Mo. App. E.D. 1994);

Section 556.036, RSMo Cum. Supp. 2011.

ARGUMENT

I (constitutionality of statute of limitations).

The circuit court erred in declaring subsection 5 of § 556.036 (criminal statute of limitations) unconstitutional because this subsection, which provides that "[a] prosecution is commenced . . . for a felony when the complaint or indictment is filed," does not "clearly and undoubtedly" violate article I, § 17 of the Missouri Constitution, which provides "[t]hat no person shall be prosecuted criminally for felony . . . otherwise than by indictment or information," in that: (1) subsection 5 only identifies the commencement of a prosecution for statute-of-limitations purposes and does not directly contravene article I, § 17, which does not purport to define when a criminal prosecution commences, but merely requires the filing of an information or indictment to prosecute a defendant; (2) subsection 5 does not purport to permit prosecution by complaint only, but only identifies the filing of a felony complaint as the triggering event that tolls the statute of limitations; and (3) statutes of limitations are legislative creations and it is within the legislature's prerogative to determine their length and the events that trigger or toll their application.

A. Standard of review.

"The constitutionality of a statute is a question of law, the review of which is de novo." *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007). "A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009) (quoting *Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368-69 (Mo. banc 2001)). "This Court will 'resolve all doubt in favor of the act's validity' and may 'make every reasonable intendment to sustain the constitutionality of the statute.'" *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007) (quoting *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984)). "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id.* "The party challenging the validity of the statute has the burden of proving the statute unconstitutional." *Id.*

B. Section 556.036.5 does not violate the Missouri Constitution.

Article I, § 17 of the Missouri Constitution states that while there can be no criminal prosecution without the filing of either an information or indictment, this constitutional requirement should not be read to "prevent either arrests or preliminary examination in any criminal case":

> That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be applied to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, nor to prevent arrests and preliminary examination in any criminal case.

MO. CONST. art I, § 17.

Missouri's criminal statute of limitations requires that prosecutions for felony offenses, with certain exceptions, "must be commenced within" three years. § 556.036.2. The limitations period "starts to run on the day after the offense is committed." § 556.036.4. The statute further provides that "[a] prosecution is commenced for a felony when the *complaint* or indictment is filed." § 556.036.5 (emphasis added). Thus, the statute explicitly provides that the limitations period is tolled upon the filing of either an indictment or a felony complaint. It is also clear that the General Assembly did not mistakenly choose the filing of a felony complaint as one of the triggering events tolling the limitations period since in 2006, the legislature amended subsection 5 to replace the filing of an information with the filing of a complaint as the commencement of a prosecution for statute-of-limitation purposes. *See* 2006 Mo. Laws 407-08.

Under Missouri's rules of criminal procedure, "[f]elony proceedings may be initiated by complaint or indictment." Rule 22.01. A complaint alleging the commission of a felony is filed in court by the prosecuting attorney and must be supported by a "statement of probable cause." Rules 22.02 and 22.03. "After the filing of a felony complaint, a preliminary hearing shall be held within a reasonable time." Rule 22.09(a). If the defendant waives the preliminary hearing or if the hearing is held and the "judge finds probable cause to believe that a felony has been committed and that the defendant committed it, the judge shall order the defendant to appear and answer to the charge." Rule 22.09 (a) and (b). Unless the time for filing is extended by the court for good cause shown, "[a]n information charging a felony shall be filed not later than ten days after the date of the order requiring the defendant to answer to the charge." Rule 23.03. A "preliminary hearing is not required to establish probable cause before prosecution may proceed by indictment," since "[p]robable cause has already been established by the grand jury." *State v. Mattic*, 84 S.W.3d 161, 166 (Mo. App. W.D. 2002).

The circuit court sustained Defendant's motion to dismiss seeking a declaration that § 536.036.5 was unconstitutional apparently because the filing of a complaint does not "commence" the prosecution under the constitution. This ruling implies that the rules of criminal procedure dealing with the filing of complaints and preliminary hearings are unconstitutional

as well since they similarly "commence" a prosecution without the filing of an information or indictment. But subsection 5 does not purport to define when a felony prosecution commences for all purposes; it simply identifies the date that a complaint or indictment is filed as the commencement of prosecution purely for statute-of-limitations purposes. In other words, the date when a complaint or indictment is filed is the point where the statute of limitations is tolled. "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning. *Belcher v. State*, 299 S.W.3d 294, 295-96 (Mo. banc 2009). It is apparent from the plain language of subsection 5 that the legislature intended that it define when the statute of limitations is tolled and not as a legislative repeal of anything in article I, section 17 of the constitution.

The circuit court's judgment also overlooks the fact that the constitutional provision that was supposedly violated does not attempt to identify when the "commencement" of a criminal prosecution occurs. In fact, neither the word 'commence' nor any of its forms appears in article I, section 17. This constitutional provision simply states that no one may be criminally prosecuted without the filing of an information or indictment. The constitution does not define the 'commencement' of a criminal prosecution as the date when an information or indictment is filed. Neither does it purport

to mandate the point in which these filings must occur during the criminal process. *Compare State ex rel. McCutchan v. Cooley*, 12 S.W.2d 466, 467 (Mo. banc 1928) (holding that a statute requiring that a preliminary hearing be held before an information could be filed was not unconstitutional under article I, § 17 of the Missouri Constitution).

The circuit court's judgment comes completely unraveled when the final clause of article I, § 17 is considered. The constitution's framers expressly provided in that clause that the constitutional requirement that an indictment or information be filed "shall not be applied . . . to prevent arrests and preliminary examinations in any criminal case." This clause shows that the framers understood that the criminal process is generally already underway by the time an information or indictment is filed. Consequently, nothing in § 17 can be inferred as identifying the filing of an information or indictment as the commencement of a criminal prosecution since that section's language recognizes that the criminal process may have already begun by either an arrest or a preliminary examination, which would necessarily include the holding of a preliminary hearing following the filing of a complaint. *Compare Cooley*, 12 S.W.2d at 467 (noting that article I, § 12 of the 1875 Missouri Constitution (as amended in 1900)—the precursor to the final clause in the current version of § 17—specifically recognized the

constitutional validity of preliminary proceedings in criminal cases occurring before the filing of an information).

Even without the final clause of § 17, the legislature has the authority to choose any event it deems appropriate as the triggering date for tolling the statute of limitations. Simply because the legislature chose to use the word "commence" in defining the start of a criminal prosecution for statute-of-limitations purposes does not also mean that it was attempting to define when a criminal prosecution "commences" for any other purpose. The vagaries of the criminal process suggest that any attempt to specifically define when the criminal process or prosecution 'commences' would be folly. For example, many, if not most, criminal prosecutions begin with an arrest, but in other situations no arrest occurs and the process begins with the filing of a complaint followed by a preliminary hearing. This hearing may or may not lead to the filing of an information because if after the preliminary hearing the court does not find probable cause to believe the defendant has committed a felony, it must discharge the defendant. Rule 22.09(b). In that situation, the criminal prosecution 'commenced' and ended before an information was ever filed. In still other situations, the criminal process begins only with the filing of an indictment without there ever having been an arrest or the filing of a complaint by the prosecutor. The various methods by which a criminal defendant is brought into court shows that the framers

did not intend for article I, section 17 to define exactly when a criminal prosecution commences. Section 17 simply requires that an information or indictment be filed at some point to constitutionally accomplish a criminal prosecution and to provide the notice of charges demanded by due process. *See State v. Hibler*, 5 S.W.3d 147, 150 (Mo. banc 1999) (holding that the information or indictment puts the defendant on notice for "due process purposes" of all offenses charged).

Even if the language of section 17 could be twisted into providing that the filing of an information or indictment commences the criminal prosecution, this does not mean that the legislature was without authority to define the 'commencement' of a criminal prosecution differently for statute-of-limitation purposes. "Statutes of limitation . . . are legislative creations that 'represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice . . . .'" *State v. Corley*, 251 S.W.3d 416, 419 (Mo. App. S.D. 2008) (quoting *United States v. Marion*, 404 U.S. 307, 322 (1971)) (noting that since "statutes of limitation have a different origin and purpose than the constitutional protection against double jeopardy, it is appropriate to apply a different analysis"). It is the General Assembly's prerogative "to fix the date when the statute commences to run . . . and . . . to declare what acts constitute the commencement of an action for the purpose of tolling a statute of limitations." *Freesmeier v. Hunt*,

530 S.W.2d 1, 3 (Mo. App. St.L.D. 1975). *See also Davidson v. Lazcano*, 204 S.W.3d 213, 217 (Mo. App. E.D. 2006) ("The legislature has the power to enact statutes of limitations and inherent in that power is the power to fix the date when the statute commences to run."). Just because the General Assembly chose the filing of a complaint (or indictment), rather than the filing of an information, as the 'commencement' of a criminal prosecution for statute-of-limitations purposes does not mean that it was also statutorily defining when a criminal prosecution 'commences' for all other purposes.

The legislature's 2006 amendment to 556.036.5 in which it changed the triggering event for tolling the statute of limitations from the filing of an *information* (or indictment) to the filing of a *complaint* (or an indictment) does not alter the analysis. "Statutes of limitations 'represent legislative assessments of relative interests of the state and the defendant in administering and receiving justice.'" *State v. Graham*, 149 S.W.3d 465, 471 (Mo. App. E.D. 2004). "If the Missouri legislature decides that the relative interests of the state and criminal defendants need to be reassessed, it can do so and change the statutes of limitations." *Id.* It was within the legislature's prerogative to amend the statute and declare that the filing of a complaint, rather than the filing of an information, is the triggering event, and its decision to make this legislative judgment does not render subsection 5 unconstitutional. *See also Laughlin v. Forgrave*, 432 S.W.2d 308, 314 (Mo.

banc 1968) (holding that "[s]tatutes of limitations are favorites of the law and will not be held unconstitutional as denying due process unless the time allowed for commencement of the action and the date fixed when the statute commences to run are clearly and plainly unreasonable").

Neither this Court's decision in *State ex rel. Morton v. Anderson*, 804 S.W.2d 25 (Mo. banc 1991), nor an article written by a law student that was printed in the Missouri Bar Journal[2] provide any support for the circuit court's actions.

In *Anderson*, the State filed a felony complaint in 1987 against the defendant for passing bad checks on November 20, 1986. *Id.* at 25-26. The complaint was amended in both 1988 and 1989 to add counts involving the defendant's passing of additional bad checks on the same date alleged in the original complaint. *Id.* at 26. The State did not file an information against the defendant relating to these charges until March 1990, well after the three-year statute of limitations contained in § 556.036, RSMo 1986, had expired. *Id.* Since subsection 5 of § 556.036 (as it existed at that time) required the

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[2] Dennis A. Golden, *The Unconstitutionality of Initiating Prosecutions by Complaint*, 66 J. MO. BAR 74 (2010). *But see* Jason H. Lamb, *The Constitutionality of Commencing Prosecution By Complaint*, 66 J. MO. BAR 336 (2010).

filing of an indictment or information (not a complaint) within three years of the date of the alleged offense, this Court held that the case was properly dismissed. *Id.* at 26-27.

What should have been a straight-forward application of the statute to the facts of the case was made more complicated by the State's argument on appeal, which was that amendments to the criminal procedure rules in 1979, including the adoption of Rule 22.01 providing for the initiation of felony proceedings by complaint or indictment, established that the prosecution was actually commenced on the date the original complaint was filed. *Id.* at 26. The opinion responds to the State's argument with a lengthy discussion about when a felony prosecution actually begins, which was based in large part on the fact that a court does not acquire jurisdiction over a criminal case until an information or indictment is filed. *Id.* This notion of jurisdiction, however, is inconsistent with, and has been rendered obsolete by, this Court's recent decision in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009). In any event, the holding in *Anderson* was simply that the case was properly dismissed under the statute of limitations in effect at the time because the information was filed more than three years after the alleged offenses were committed. *Anderson* has no application in this case because, as noted above, subsection 5 of the statute of limitations was amended in 2006 to replace the word "information" with the word "complaint" and to provide

that a prosecution is commenced, for statute-of-limitations purposes, by the filing of either an indictment or a "complaint."

The student-authored bar journal article is also unhelpful since its entire premise proceeds on the fallacy that the statute of limitations allows for the prosecution of a defendant by complaint in violation of the constitutional mandate that no one may be prosecuted criminally except by information or indictment. *See* Golden, supra note 2, at 74. What the article's author overlooks is that subsection 5 of the statute of limitations simply identifies the event—the filing of a complaint—that tolls the statute of limitations; it does not purport to authorize the prosecution of a criminal case solely by complaint. It is the legislature's prerogative in fashioning a statute of limitations to choose the events that triggers both the commencement and tolling of the limitations period. The law clearly provides that the filing of a complaint must be followed by the filing of an information for the case to move forward. If no probable cause is found after a preliminary hearing on the complaint, then no further prosecution can take place and the defendant is discharged. In no event is a defendant prosecuted solely by complaint and subsection 5 in no way purports to permit such a practice.

The circuit court erred in declaring subsection 5 of § 556.036 unconstitutional.

II (dismissal of prosecution).

The circuit court erred in dismissing with prejudice the criminal case against Defendant because the three-year statute-of-limitations period contained in § 556.036 begins on the day after the offense is allegedly committed and is tolled by the filing of a complaint or indictment in that the record shows that Defendant allegedly committed the felony offenses of burglary and stealing on March 12, 2008, and the State filed a felony complaint against Defendant on February 28, 2011, which was within the three-year limitations period.

A. Standard of review.

A circuit court's determination regarding the application of the statute of limitations is a question of law that is reviewed de novo "with no deference" to the circuit court's decision. *State v. Rains*, 49 S.W.3d 828, 831 (Mo. App. E.D. 2001).

B. The State's prosecution was not barred by the statute of limitations.

Under the criminal statute of limitations, the prosecution of felonies, with certain exceptions, must be commenced within a three-year limitations period. § 556.036.2. The limitations period "starts to run on the day after the offense is committed." § 556.036.4. The statute also provides that a

"prosecution is commenced . . . for a felony when the complaint or indictment is filed." § 556.036.5.

Here, the record shows that the date Defendant allegedly committed the offenses of burglary and stealing (as shown in the probable cause statement attached to the complaint) was March 12, 2008. (L.F. 8-9). The State filed its complaint on February 28, 2011, which was within the three-year statute of limitations period. (L.F. 1, 6). The circuit court thus erred in sustaining Defendant's motion to dismiss the case with prejudice for failing to comply with the statute of limitations. *See State v. Stein*, 876 S.W.2d 623, 626 (Mo. App. E.D. 1994) (holding that the circuit court erred in dismissing the State's charges against the defendant when the record showed they were filed within § 556.036's three-year statute of limitations).

CONCLUSION

The circuit court erred in declaring § 556.036.5, RSMo Cum. Supp. 2011, unconstitutional and in dismissing the State's felony information against Defendant with prejudice. This Court should reverse the circuit court's judgment and set aside the court's dismissal of the felony information against Defendant.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Evan J. Buchheim
EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P. O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3700
Fax: (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,725 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that this brief was served through Missouri's electronic filing system on July 2, 2012, on:

Alexa Pearson
1000 W. Nifong, Building 7, Suite 100
Columbia, Missouri 65203
Phone: 573-882-9855
Fax: 573-884-4793

Shawn Robert Markin
630 North Robberson
Springfield, Missouri 65806-0636

/s/ Evan J. Buchheim
EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3700
Fax (573) 751-5391
evan.buchheim@ago.mo.gov

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